

Supreme Court, U. S.
FILED

AUG 5 1978

MICHAEL ROBAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1843

LEONARD CROW DOG,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

**BRIEF OF THE NATIONAL COUNCIL OF CHURCHES
OF CHRIST IN THE UNITED STATES OF AMERICA,
AS *AMICUS CURIAE*, IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

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Interest of Amicus*

The National Council of Churches of Christ in the United States of America is the cooperative agency of thirty national Protestant and Eastern Orthodox religious denominations with an aggregate membership of over 40,000,000 in the United States. The National Council of Churches is organized exclusively for religious purposes, and by its certificate of incorporation is committed "to promote the application of the law of Christ in every relation of life."

* Letters consenting to the filing of this brief have been obtained from petitioner's counsel and from the Solicitor General of the United States and are on file with the Clerk of the Court.

The member denominations of the National Council of Churches have engaged in extensive mission work among the Indians of South Dakota for many years, as have local congregations within that state. In addition, its member denominations and the National Council of Churches in 1973 sent special representatives skilled in conflict resolution to try to help achieve a peaceful solution to the Wounded Knee occupation by members of the American Indian Movement. The Wounded Knee conflict gave rise to the prosecution of petitioner, Leonard Crow Dog.

Leonard Crow Dog has been well known to church representatives, particularly because he is acknowledged as spiritual leader by more than eighty Indian tribes, and is a major religious leader among American Indians.

The General Board of the National Council of Churches, on March 3, 1976, adopted a formal resolution of support for the petitioner in view of his important religious role in the Indian community and the special circumstances of his arrest and prosecution, authorizing the Division of Church and Society of the National Council of Churches, through its Due Process of Law Fund, to support the efforts of petitioner to obtain judicial review of his conviction.

The petition for a writ of certiorari* which has been submitted on behalf of Leonard Crow Dog raises three substantial issues of due process: (a) the government wrongfully used informers in penetrating defendant Crow Dog's defense team, and the trial court wrongfully refused to permit Crow Dog's counsel to inspect an informer's file (Petition, point III, pp. 37-42); (b) the government failed to record and produce the grand jury testimony of a critical prosecution witness (Petition, point II, pp. 32-36); and

* References herein to the petition for writ of certiorari will be indicated as Petition.

(c) the government failed to disclose exculpatory identifying photographs, in violation of the rules of disclosure, and the trial court failed to conduct an adversary hearing on the matter (Petition, point I, pp. 23-31).

It is the concern of *amicus*, the National Council of Churches, that each of these issues centers on the fairness of the judicial procedures to which Crow Dog was subject. The National Council of Churches submits that the procedures herein offend the nation's sense of fairness, and that in some aspects these procedures amount to a systematic and intentional deprivation of due process not only to an American Indian religious leader but to all defendants.

That Crow Dog is an American Indian underlines the importance of this case and is of especial concern to *amicus*. The American Indian has been steadily victimized for over three hundred years in this land. Displaced from his own territory, the American Indian has never developed the cultural or professional institutions which would permit him to battle the government on remotely equal levels of sophistication. He is at present essentially dependent upon the largesse of non-Indian institutions, including a non-Indian judicial system which operates in a language often foreign to him, and without American Indians on its juries.

He is entitled to every iota of due process that the law can provide. But the facts of this case, as described below and in the Petition, show that the government, with its incredible power, has deprived Crow Dog of due process by infiltrating his defense councils, by *selectively* failing to record and produce grand jury testimony, and by failing to permit a proper inquiry into relevant and material photographs.

This Court, we submit, should consider the history of the American Indian and the particular history of Crow Dog, in considering the importance of the full due process to which he was entitled. Wounded Knee was a political confrontation, deriving from the years of continual displacement of the Indian from his own historic places. Crow Dog is a central religious figure in the American Indian movement, and there is little doubt, given the American Indian's intense sense of "place" and the significance of Wounded Knee as a "historic place," that Crow Dog's arrest and prosecution was one more example of the cultural conflict between the Indian and the white man in the history of this country.

In that context, that Crow Dog—of all people—should then be deprived of the elements of due process is profoundly wrong, as stated below.

Summary of Argument

First, the use of informers by the government in defense deliberations grossly offends fair judicial procedure and thereby deprives the defendant of his rights to counsel under the sixth amendment of the Constitution. In this case, infiltration of defense deliberations was undoubtedly intentional and could serve only to give the prosecution an unfair advantage at trial. The trial court refused to permit defense counsel to inspect a six inch thick file of one of the informers, but merely examined the file *in camera*. An *in camera* review of the file by the trial court does not allow adequate evaluation of materiality, since the determination of materiality can only be made by the advocate for the defendant. In this case there was no reason whatever why defense counsel could not have inspected that file, and the

denial of such inspection of the file was an improper denial of the defendant's sixth amendment rights.

Second, the government intentionally did not record the grand jury testimony of a key government witness, on the ground, as stated by the prosecutor, that "As is the policy in our office, law enforcement testimony before the grand jury is not transcribed." Defendant was entitled to inspect grand jury testimony under the Jencks Act, 18 U.S.C. §3500(e)(3), and the selective failure to transcribe "law enforcement" testimony deprived defendant of critical statements to which he was entitled. Had such testimony been at variance with the witness's trial testimony, the trial might well have resulted in the acquittal of the defendant. Grand jury testimony is not random material assembled by the prosecutor in preparation for trial, but is a scheduled, formal statement made under oath in circumstances where a court stenographer is obviously available. The only possible purpose of the government's failing to record such selected testimony can be to prevent the defendant from using it at the trial to impeach a government witness. Under Rule 16 of the Federal Rules of Criminal Procedure, the recorded statements by the defendant before the grand jury are subject to disclosure, and there is not a shadow of a doubt that the prosecution would record such statements. It directly contravenes the purpose of the Jencks Act and the due process rights of the defendant, for the prosecution to fail to record such grand jury testimony.

Third, defendant's counsel sought production at trial of a group of photographs which allegedly contained pictures of defendant and may have been shown to government witnesses in advance of trial. The trial court held no hearing or inquiry to determine the existence or materiality of the

pictures. The Court of Appeals conducted a limited review of the record with respect to the materiality of the pictures. Defendant, however, was entitled to an adversary hearing on this matter. Identification of the defendant was a critical issue at trial. There had been conflicts among witnesses as to identification, and the testimony of witnesses might have been fatally impeached had the suppressed photographs been produced. The determination of materiality was clearly a trial court function and a full adversary hearing should have been held. The Court of Appeals erred in making the determination itself, and the case should be remanded for an adversary hearing.

ARGUMENT

I.

The use by the government of informers within the defense team is a direct violation of defendant's right to counsel, in violation of the sixth amendment, and defendant was entitled to inspect any informer's file.

As stated in the Petition (pp. 9-14) two government informants, Douglas Durham and John Schafer, had managed to infiltrate the legal defense organization established for the defense of the Wounded Knee defendants including petitioner herein. Crow Dog made a motion before the trial court for dismissal on the ground that the infiltration fatally impaired his sixth amendment rights. (Petition, p. 12.)

Any adversary proceeding with respect to the fruits, if any, of the informers' work was severely limited. Over the objections of Crow Dog's attorneys, the court examined the informer Durham's file *in camera*. Crow Dog's attorneys' application for leave to examine the informer Durham's

file was denied by the court, evidently on the ground that the court's *in camera* examination was sufficient. (Petition, pp. 12-13.)

It is the contention of the *amicus* National Council of Churches that this procedure amounted to a denial of an adversary inquiry into the fruits of the informer's penetration of the defense legal team and thereby violated the petitioner's sixth amendment rights.

At the heart of judicial fairness are the unimpaired right to counsel and the right to work with counsel and plan defense strategies free from interference by or knowledge of the opposition. The use of informers in defense councils makes a burlesque, a charade, of the adversary system. Such use of an informer is trickery, pure and simple; it perverts justice, and is an insult to the principles of due process. That an American Indian, his people long victimized, should be further victimized by government informers trampling on his sixth amendment rights is repugnant.

As well stated by the Court of Appeals for the Fourth Circuit, in *Bursey v. Weatherford*, 528 F.2d 483 (4th Cir. 1975), cert. granted 44 U.S. L. Week 3733 (June 22, 1976):

"Ours is an adversary system of justice. Deliberately planting an informer in the council of trial preparation . . . is, of course, a 'gross' intrusion upon the confidentiality of the lawyer-client relationship protected by the sixth amendment." 528 F.2d at 486.

The Fourth Circuit held the critical question to be whether the intrusion into the defense councils was deliberate or inadvertent:

"We conclude that whenever the prosecution knowingly arranges or permits intrusion into the attorney-client

relationship the right to counsel is sufficiently endangered to require reversal and a new trial." 528 F.2d at 486.

In the present case, the intrusion was undoubtedly intentional. Informer Durham had numerous contacts with government agents. (Petition, p. 12.) The use of informers by the government in the course of the Wounded Knee incident was very substantial indeed, amounting to 313 persons from January 1, 1973 to May 31, 1975. (Petition, p. 14.)

"Deception" by the use of informers by the government to solve crimes or apprehend criminals may be "an appropriate instrument in crime solution." *Bursey v. Weatherford*, *supra*. But the use of informers actually to deceive the defendants and defense counsel by becoming a part of the defense process itself is an entirely different event, to be judged by entirely different standards. Gone is the need to "solve" a crime. The only possible use of an informer in such circumstances can be interference with the defendant's obtaining a fair trial, the gaining of an advantage, through deception, in the trial process. The National Council of Churches respectfully submits that such insinuation of an informer into defense team councils grossly offends any sense of fair play and justice. As stated by Justice Black in *In re Murchison*, 349 U.S. 133 (1955), "A fair trial in a fair tribunal is a basic requirement of due process." 349 U.S. at 136. What is "fair" and "not fair" is impossible to define precisely any more than "due process" can be precisely defined. Justice Frankfurter has said:

"Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions can not be brought about by methods that

offend 'a sense of justice.'" *Rochin v. California*, 342 U.S. 165 at 173 (1952).

Amicus respectfully submits that the integrity of the judicial system of this country requires that the *intentional* insinuation by the government of an informer into the defense deliberations and preparations of any defendant—even though such insinuation may have occurred well in advance of the trial itself—is in itself a gross violation of due process and of the rights of the defendant under the sixth amendment of the Constitution.

Upon motion by Crow Dog, seeking dismissal of his case because of the Government's use of an informer, the court conducted an *in camera* examination of the apparently voluminous file of the informer Durham, and Crow Dog's counsel were denied, over their objections, any opportunity to examine that file. (Petition, pp. 12 and 13.) Crow Dog's counsel were thus effectively prevented from conducting any inquiry or interrogation, or indeed from making any determination, as to the extent to which Durham had relayed to government agents information regarding defense strategies and planning. (Petition, p. 13.)

The trial court, therefore, made its own determination, without adversary inquiry, that there was no evidence that Durham, the informer, had been present during defense discussions on Crow Dog or that he passed on such information to the FBI. (Petition Appendix, p. 37a.) The trial court concluded that no prejudice had been shown to Crow Dog, and that no "gaining" of information had been shown. (Petition Appendix, pp. 37a-38a.)

Amicus urges, however, that it is not the trial court which can, *in camera*, make the determination on the critical issue

of whether the informer's file bears directly or indirectly on the defendant's preparation for trial. The issue is a significant one of fact, which plainly requires examination under the intense light of adversary inquiry. That inquiry certainly requires that the defendant's attorneys have an opportunity to review the file in question. The trial judge, with judicial responsibility for the entire trial, but presumably with no knowledge of the deliberations of the defense team, can hardly evaluate adequately the relevance of an informer's file. As stated by the Court in *Dennis v. United States*, 384 U.S. 855 (1966) with respect to defense counsel's examination of grand jury minutes:

"The determination of what may be useful to the defense can properly and effectively be made only by an advocate." 384 U.S. at 875.

Of course, as stated by this Court in *Taglianetti v. United States*, 394 U.S. 316 (1969), the defendant "had no right to rummage in government files." 394 U.S. at 317. But here there was evidently an identifiable six inch thick informer's file. (Petition, p. 13.) Petitioner certainly demonstrated that informer Durham had infiltrated the defense team councils. Deprived of the right to examine the informer's file, petitioner's attorneys were deprived of the means of sustaining their burden of proof with respect to materiality.

The government has incalculable power, especially when posited against a member of the American Indian community. The history of the American Indian is a history of the deprivation of rights. Here an American Indian was deprived of his right to an adversary hearing on an important trial issue, his unimpaired right to counsel. His counsel should have been permitted to test the materiality

of the informer's file. Only an adversary hearing could permit that test. An *in camera* examination is not an adversary proceeding.

This Court well recognizes the fundamental need for the adversary proceeding with respect to production of relevant files. As stated in *Alderman v. United States*, 394 U.S. 165 (1969):

"Adversary proceedings are a major aspect of our system of criminal justice. Their superiority as a means for attaining justice in a given case is nowhere more evident than in those cases . . . where an issue must be decided on the basis of a large volume of factual materials, and after consideration of the many and subtle interrelationships which may exist among the facts reflected by these records. As the need for adversary inquiry is increased by the complexity of the issues presented for adjudication, and by the consequent inadequacy of ex parte procedures as a means for their accurate resolution, the displacement of well informed advocacy necessarily becomes less justifiable." 394 U.S. at 183-184.

Petitioner Crow Dog's situation graphically illustrates the importance of not displacing "well informed advocacy" by *in camera* inspection. Wounded Knee was, as is well known, an especially tense and heartbreaking time in the history of relations between the American Indian and the United States Government. The government "penetrated," or more accurately "deluged," the Wounded Knee camp with informers. The use of the informer was clearly central to the government's efforts to bring the Wounded Knee conflict to an end; and then after termination of the conflict the government appears to have knowingly continued to

receive information from informers with regard to defense plans and preparations.

A substantial segment of our society sees petitioner Crow Dog not as a criminal, but as a hero and a major religious leader committed to the effort to maintain the integrity of the American Indian and the sanctity of his historic places in the face of steady government encroachment. Although the government may view Crow Dog as a common criminal, his visible major role in the leadership in the American Indian movement makes vivid the inequity of depriving him of a fully fair judicial proceeding. His case was presented by his own counsel, who sought to show that the informer's infiltration of the defense processes poisoned the prosecution. As further stated by this Court in *Alderman, supra*,

"The trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin." 394 U.S. at 183.

Certainly it would have been wholly practical for the informer's file to have been examined by defense counsel. The government and the courts below have not given any reason for the denial of examination of the file. (Petition, p. 40.) The trial court appears to have relied on the *in camera* procedure, without reason or necessity, to exclude defendant's counsel from fully participating in determining whether the fruits of the informer's work bore upon the defendant's sixth amendment rights.

The trial court sought to explain away the need for adversary inquiry regarding the informer and his file by con-

cluding that "No prejudice to appellant has been shown to arise . . ." (Petition Appendix, p. 37a.) But the measurement of prejudice by the trial court following an *in camera* review of the offending file is inconsistent with the fundamental nature of the right to counsel. In *Glasser v. United States*, 315 U.S. 60 (1942), in which the Court considered whether the appointment of a single counsel for two defendants deprived the second defendant of his sixth amendment rights, this Court stated:

"To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart as counsel for Kretske is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." 315 U.S. at 75-76.

Accordingly, the National Council of Churches of Christ, *amicus* herein, respectfully submits that the failure of the trial court to permit defense counsel's examination of the informer's file was a substantial deprivation of sixth amendment rights, and at least requires a remand of this case for a trial court hearing on the materiality of the informer's file.

II.

The selective failure of the government to record and produce grand jury testimony violated defendant's rights under the Jencks Act.

One of the prosecution witnesses testified before a grand jury, but his testimony was not transcribed. The prosecutor stated: "As is the policy in our office, law enforcement testimony before the Grand Jury is not transcribed." (Petition, p. 32.)

The United States Government practices the art of selective recording of testimony before federal grand juries. Some federal courts require that proceedings before a grand jury shall be recorded and transcribed and others do not. (See petition, pp. 32-36.)

Amicus urges that the current state of federal procedure on this question is chaotic, and is chaotic in an area which directly affects the fairness of the trial available to any accused.

It is plainly preposterous that a prosecutor could, by his own arbitrary act or even by so-called office policy, deprive the defendant of the use of the grand jury statements of critical witnesses. The selective determination not to transcribe "law enforcement testimony" weakens the defendant's case by eliminating a fruitful source of possibly contradictory or exculpatory testimony. The only possible effect of the failure so to transcribe grand jury testimony can be to help the prosecution. That it should be a prosecutorial policy not to transcribe "law enforcement testimony" is inexcusable; it is *that* very testimony which is relevant

in a criminal prosecution. Why is it prosecution policy not to record such testimony? Is it to avoid discrepancies? To reduce the possibility of contradictory testimony?

In this case, the "law enforcement testimony" which went unrecorded was by no means an abstraction but was vital material central to the prosecution's case. That four postal inspectors were "interfered" with at Wounded Knee and held before being released was not in issue at Crow Dog's trial; in issue was Crow Dog's role. Postal Inspector Graham testified at the trial, and his testimony conflicted with prior statements and was internally contradictory. (Petition, p. 17.) Inspector Graham testified before the grand jury but his testimony was not recorded. Such testimony occurred early in the course of prosecution, and it would be relatively unrehearsed compared with trial testimony. His grand jury testimony may well have included contradictions regarding the role of Crow Dog and his alleged participation in specific acts. Such contradictions could have significantly impaired Graham's credibility as a witness and perhaps have altered the outcome of the trial.

It is therefore not academic or theoretical to argue that grand jury minutes would have been relevant and essential here. The case might have gone the other way had such statements been recorded.

Jencks v. United States, 353 U.S. 657 (1957) followed by the Jencks Act, 18 U.S.C. §3500, makes clear how fundamental is the right of a criminal defendant to inspect statements of government witnesses. The 1970 amendment to the Jencks Act, 18 U.S.C. §3500(e)(3) specifically extended Jencks Act coverage to statements made before a grand jury.

Jencks Act sanctions are plain and tough: if the government elects not to comply with the production requirements, the witness's testimony shall be stricken. The *Jencks* decision rationale is, of course, grounded in due process on the principle that a defendant is entitled to "evidence relevant and material to his defense." 353 U.S. at 667. The trigger to the imposition of Jencks Act sanctions is the "election" by the Government not to furnish the required statements.

While the inadvertent destruction of grand jury minutes may not amount to the "election" giving rise to Jencks Act sanctions, the fact is that our government intentionally refrains from recording selected grand jury testimony although fully able to record all grand jury testimony. The grand jury proceeding is not an occasional or a casual or haphazard or unexpected event, but rather is a scheduled and essential procedural step in a federal criminal prosecution. The testimony provided at a grand jury proceeding is fundamentally different from random information obtained by the fruits of the prosecution's investigation; it would be grossly impractical to require that all such information be crystallized into written statements. But a statement given before a grand jury is formal; it is planned; it takes place in a court setting; it is made under oath; court reporters are available; it may well result in an indictment. In the event of an indictment, grand jury testimony becomes the initial statement of the government's case against the defendant. Grand Jury testimony is at least as relevant to the defendant's case as any other evidence which might be available to the defendant. Discrepancies between grand jury testimony and trial testimony can show up fatal weaknesses in the prosecution's case.

Of course, the government may, through unintentional inadvertence or mischance or Act of God, find that grand jury minutes or stenographic notes have been destroyed, and the courts have held that such an accident is not an "election" by the government not to produce the documents. As stated by the court of appeals in *United States v. Perry*, 471 F.2d 1057 (D.C. Cir. 1972):

"We do not read 'elect' in the literal or narrow sense, but rather as a purposive or negligent act on the part of the Government which has as a direct and foreseeable result the loss or destruction of documents which otherwise the Government could be compelled to produce." 471 F.2d at 1063.

However, the determination not to record grand jury testimony is, without a doubt, a purposive act. The failure to record the testimony of witnesses before a grand jury has the direct and thoroughly intentional result of depriving a defendant of often significant evidence for impeachment of credibility or suppression of evidence or other entirely proper purposes. It cannot be doubted that grand jury testimony, unavailable because unrecorded, could alter the outcome of numerous trials, including the trial of Crow Dog.

It is, *amicus* National Council of Churches submits, a historic goal of this Court to resolve differences among the various federal courts and to promulgate procedures which promote fair trials. There is no question but there is a substantial conflict among various federal courts as to whether it is necessary that grand jury testimony be recorded. (Petition, pp. 32-36.)

This Court in *Dennis v. United States*, 384 U.S. 855 (1966) was clear that grand jury testimony is significantly important to an adequate defense, and that a lower court cannot "assume" that such testimony if produced would not have been useful to the defendant:

"... we cannot accept the view of the Court of Appeals that it is 'safe to assume' no inconsistencies would have come to light if the grand jury testimony had been examined. There is no justification for relying on such 'assumption'." 384 U.S. at 874.

Thereafter, of course, the Jencks Act was amended specifically to include grand jury testimony within the enumerated statements required to be produced. 18 U.S.C. §3500(e)(3).

The secrecy of the grand jury proceeding has been repeatedly condemned. See *Dennis v. United States*, *supra*, at note 17. What is the determination not to record such testimony but the preservation of the often-condemned grand jury secrecy?

The steps taken by this court since *Jencks v. United States*, *supra*, reach toward the requirement that, to carry out the intent of the *Jencks* decision and the Jencks Act, grand jury testimony must be recorded. Permitting the prosecution to refrain from recording such testimony is to permit the prosecution to elect not to produce required statements covered by *Dennis v. United States*, *supra*, and as well as by the specific language of the Jencks Act.

Rule 6 of the Federal Rules of Criminal Procedure refers to stenographic recording of grand jury testimony, in 6(d) and 6(e), although Rule 6 does not in so many words require such recordation. Under Rule 16, recorded statements

by the defendant before a grand jury are subject to disclosure; clearly the prosecution will ensure the recording of any such statements by the defendant since such statements would be useful for impeachment purposes. That "law enforcement testimony" is not similarly recorded prejudices the defendant.

Amicus National Council of Churches respectfully submits that, having in mind the purpose and meaning of the *Jencks* decision, it offends all logic to allow the government to deprive defendants of disclosure by the act of systematically refraining from recording grand jury testimony.

Amicus submits that it is time for this Court to rule that disclosure and production procedures require that grand jury proceedings be recorded.

III.

The government's failure to produce exculpatory photographs and the trial court's failure to conduct an adversary hearing on such production deprived the defendant Crow Dog of due process.

The National Council of Churches urges that the failure of the District Court to conduct a hearing on the disclosure of photographs which may have been favorable to the defense requires that this court remand the case either for a new trial or, at the very least, for a hearing on the materiality of the photographs.

As set forth in detail in the Petition (pp. 23-31), defendant Crow Dog's counsel sought production by the government of a group of photographs which may have contained

pictures of defendant and may have been shown to government witnesses during interrogation by the FBI. The defense contended the photographs were relevant to identification of the defendant. The trial court conducted no hearing or inquiry to determine whether the photographs existed or were shown to witnesses. (Petition, p. 25.)

The contention of *amicus* National Council of Churches is that this is precisely the situation in which fairness to any defendant, whether American Indian or any other defendant, requires a full evidentiary hearing as to the materiality of the photographs in question.

Amicus does not contest the standards of *Brady v. Maryland*, 373 U.S. 83 (1963), as applied by *Moore v. Illinois*, 408 U.S. 786 (1972), which holds it a violation of due process where (a) evidence is suppressed by the prosecution after a request for production by the defense, (b) the evidence is favorable to the defense, and (c) the evidence is "material" either to guilt or punishment.

Amicus National Council of Churches does contend, however, that the District Court's failure to conduct an evidentiary hearing was a deprivation of due process, and that the Court of Appeals may not wipe out that deprivation by merely concluding, by whatever means, that the suppressed evidence was not material.

As stated in the Petition:

"No hearing, procedure, or even *ex parte* disclosure to the courts below, and *in camera* examination by them, of the relevant government records and photographs has been conducted to determine whether the group of photographs in question exists, or was shown

to the government witnesses on March 11, 1973, or whether Crow Dog's picture is included in the group." (Petition, p. 25.)

The Court of Appeals, however, in a limited look at the record for purposes of determining materiality, concluded that the suppressed photographs would not have been material. As acknowledged by the Court of Appeals, Crow Dog met two of the *Brady* requirements: (a) suppression of evidence by the prosecution after demand by the defense, and (b) the evidence was favorable to the defense. (Petition Appendix, p. 18a.) The Court of Appeals, however, made its own determination of materiality, and Crow Dog has had no opportunity to have the photographs in question produced and, in an adversary proceeding, to determine whether the photographs were in fact material.

Amicus contends that no later court can constitute itself the trial court and, in effect, conduct a hypothetical evidentiary hearing by merely perusing the record and deducing that any such trial court hearing would probably not have proven materiality.

Identification of the defendant Crow Dog was critical to the prosecution's case. The eye-witness identifications by Inspectors Graham and Schneider were flimsy and contradictory; Graham, in particular, admitted numerous mistakes regarding his identification. (Petition, p. 27.) Inspector Schneider did not identify Crow Dog until the eve of trial some twenty-six months after the event. (Petition, p. 27.) Another inspector had filed a report at variance with Graham and Schneider concerning the role of Crow Dog. (Petition, p. 27.) The pivotal identification testimony of Graham and Schneider might well have been fatally impeached had the suppressed photographs been produced.

Given the gravity of such evidence Crow Dog was entitled to an adversary hearing to develop the facts regarding the photographs. Who is to say what would have developed at the trial court hearing? The possibility that such a hearing might have resulted in a determination of "materiality" ought to be enough now to require remand in order that such a hearing be conducted.

Precisely this procedure was followed by this Court in *Goldberg v. United States*, 96 S.Ct. 1338 (1976), involving production of documents under the Jencks Act. This Court held it was the obligation of the trial court, not the appeals court, to conduct a sufficient inquiry to determine whether production in *Goldberg, supra*, was required under the Jencks Act. As stated by the Court:

"The Court of Appeals erred in undertaking to make the initial determination whether the materials constituted producible 'statements.' If that function may ever be properly undertaken by a court of appeals, the Court of Appeals should not have attempted to make the determination in this case." 96 S.Ct. at 1347.

The essence of *Goldberg* is that certain matters can be decided properly by the trial court only after a hearing. In such circumstances an appeals court cannot substitute itself for the trial court. That is the situation before this Court presented by Crow Dog. The appeals court made its own review of the record limited to the issue of materiality—hardly an open adversary proceeding—and substituted its own review for the adversary inquiry which *Amicus* contends the trial court should have permitted.

Indeed, *Amicus* urges that although it is certainly possible Crow Dog might not have prevailed in such a trial court hearing, the record by no means demonstrates that Crow Dog could *not* have prevailed. He was therefore *entitled* to the trial court hearing, and by being deprived of such hearing he was deprived of a fair trial.

Crow Dog's case is important not only because he is a defendant who was deprived of fundamental due process in being denied an essential trial court evidentiary hearing, but also because he and his people as American Indians are in need of special protection by this Court from the overwhelming power of our government. Crow Dog's denial of due process is grossly wrong, and impugns and detracts from the judicial procedures which have been established to provide fair protections to American Indians and all defendants from the abuse of governmental powers.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition of Leonard Crow Dog for a writ of certiorari should be granted.

Respectfully submitted,

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